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15 Alice Vysata

16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA**

18 ALICE VYSATA,

19 Plaintiff,

20 v.

21 MARC MENOWITZ, An Individual; and
22 APARTMENT RENTAL ASSISTANCE II,
23 INC. dba APARTMENT CORP.

24 Defendants.

CASE NO.: 18-cv-06157-JAK-RAO

**DECLARATION OF COUNSEL
BARBARA E. FIGARI IN SUPPORT
OF PLAINTIFF ALICE VYSATA'S
MOTION FOR SANCTIONS**

**[Filed Concurrently with Plaintiff's
Notice of Motion and Memorandum of
Points and Authorities]**

Hearing Date: January 2, 2019
Time: 10:00 a.m.
Ctrm: 590

1 I, Barbara E. Figari, declare as follows:

- 2
- 3 1. I make this Declaration of my own personal knowledge, except where stated upon
- 4 information and belief, and if called as a witness, I would and could testify competently
- 5 to the matters stated herein.
- 6
- 7 2. I am an attorney admitted to practice in the State of California and am a member of the
- 8 Bar of the State of California having been admitted in 2007. I am admitted to practice
- 9 before this Court, as well as the Southern, Eastern and Central District Courts in
- 10 California, the Ninth Circuit Court of Appeals, and the United States Supreme Court. I
- 11 am one of the attorneys of record for the Plaintiff in this matter, Alice Vysata.
- 12 3. Attached hereto as **Exhibit 1** is a true and correct copy of the Transcript of Proceedings
- 13 from the November 19, 2018 proceedings in Palm Beach County Circuit Court.
- 14
- 15 4. Defendants' counsel did not have my permission to file a joint report, using the caption
- 16 from myself and my co-counsel's office. Defendants' counsel did not have permission to
- 17 file a joint report containing my signature.
- 18 5. Pursuant to Local Rule 7-3, a meet and confer telephone call was held among counsel on
- 19 December 5, 2018. This phone call lasted 35 minutes. Thereafter, Plaintiff's counsel
- 20 responded to Defendant's counsel's email messages regarding the same.
- 21
- 22 6. I have spent 3.1 hours drafting this motion, 35 minutes on a meet and confer phone call
- 23 with Defendant's counsel, and 21 minutes on the November 9 phone call with
- 24 Defendant's counsel and this Court. That time does not include time spent discussing
- 25 these matters with co-counsel, meeting and conferring with Defendants' counsel as to the
- 26 underlying reports or issues, or any future briefing or appearances as to this motion.
- 27
- 28

1 I declare, under penalty of perjury under the laws of the State of California, that the
2 foregoing is true and correct. Signed this 24th day of January 2019 at Rancho Cucamonga,
3 California.

4
5 /s/ Barbara E. Figari

6 Barbara E. Figari
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1 IN THE CIRCUIT COURT OF THE 15TH
2 JUDICIAL CIRCUIT IN AND FOR
3 PALM BEACH COUNTY, FLORIDA
4 CASE NO. 50 2015 CC 008029 XXXX MB

5
6 APARTMENT RENTAL ASSOCIATES,
7 Plaintiff,

8 vs.

9 ALICE VYSATA,
10 Defendant.

11 - - - - -X

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15 HEARING BEFORE THE
HONORABLE JAMES NUTT

16
17 DATE TAKEN: NOVEMBER 19, 2018
18 TIME: 1:30 P.M. - 2:50 P.M.
19 PLACE: PALM BEACH COUNTY COURTHOUSE
20 205 NORTH DIXIE HIGHWAY
21 WEST PALM BEACH, FL 33401
22

23
24 REPORTED BY: RICK WHITE, C.S.R., F.C.R.
and NOTARY PUBLIC
25

APPEARANCES:

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On behalf of the Defendant

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By: Allison Duffie, Esq.

aduffie@scottwagnerlaw.com (live.)

- and -

Daniel Kalish, Esq.

(via telephone.)

-- P R O C E E D I N G S --

THE BAILIFF: All rise. Court is now in session, the Honorable James Nutt now presiding.

THE COURT: We have counsel on the phone.

MR. KALISH: Your Honor, this is Dan Kalish representing Alice Vysata.

THE COURT: All right. Who do we have here? Let's take all appearances.

MR. CHASE: Good afternoon, Kenneth Chase for the plaintiffs, Apartment Rental Assistance, Incorporated and Mark Manowitz. With me today is Zack Slinker from my office.

THE COURT: Great.

MS. DUFFIE: Allison Duffie from Scott Walker and Associates and we are local counsel for Alice Vysata.

THE COURT: I kept getting memos about referral. You can stand, sit down, whatever you feel like. Where do we stand with all this? This is just a boat load of stuff, not to use technical terms or anything, but the stuff that you guys gave me, I couldn't figure out or organize it.

I have never had this happen in any of these cases. What I need is a list of what motions were outstanding or resolved or just the issues. A

1 lot of this stuff went back and forth. I tried to
2 make sense of it all. So the one thing that I
3 read, basically, you have three motions for today.

4 MR. CHASE: Correct, Judge.

5 THE COURT: Partial summary judgment and
6 then two motions to dismiss.

7 MR. CHASE: That's right, Judge.

8 THE COURT: With forum non conveniens being
9 one of those.

10 MS. DUFFIE: Yes, Your Honor.

11 THE COURT: All right. Let me get my head
12 around it all. What do you think is the best way
13 to approach it?

14 MR. CHASE: Judge, do you have any
15 suggestions.

16 MS. DUFFIE: I think they filed a motion
17 for summary judgment, the plaintiff. I think it
18 probably makes more sense for them to start.

19 THE COURT: Well, forum non conveniens got
20 an attraction. That would settle it all.

21 MS. DUFFIE: Okay.

22 THE COURT: I am concerned about the timing
23 issue on that one more than anything.

24 MR. CHASE: I have case law for Your Honor
25 on that.

1 THE COURT: Yes, a lot of which you cited
2 here already.

3 MR. CHASE: Yes.

4 THE COURT: Yeah. I mean, if you think you
5 should take the summary judgment first.

6 MS. DUFFIE: Your Honor, whatever you would
7 care to do.

8 THE COURT: The time that I have had to
9 spend with it, unfortunately I am usually well
10 steeped in all of my hearings, but we're going to
11 have to start with the basics on this. But I will
12 take it however you guys want to bring it to me.

13 MR. CHASE: I would be happy to begin.

14 THE COURT: What has been resolved or not
15 resolved. Are we conferring or minimizing things?

16 MR. CHASE: The only thing that is before
17 the Court now is the motion for partial summary
18 judgment filed by the plaintiffs. And after that
19 was filed there was two motion to dismiss the
20 amended complaint, and the other one was motion to
21 dismiss on forum non conveniens.

22 Those are the only motions before the Court
23 today. With respect to the meet and confers, that
24 had to do with subpoenas and we are very close to
25 an agreement on that. We don't plan to argue that

1 at all today.

2 THE COURT: Okay. Those are basically
3 compelling for fees and all that. Why don't we
4 tackle this partial summary judgment, which is
5 multiple, multiple points, if I got that right.

6 MR. CHASE: Correct, Judge.

7 THE COURT: All right. Do you guys agree
8 on any of this stuff? You guys are filing motions
9 and memorandums from the federal court into the
10 state court. I don't know what you all consider
11 current right now other than this one is your forum
12 non conveniens.

13 MR. CHASE: The forum non conveniens is the
14 defendant's motion.

15 THE COURT: Right, right. I'm just trying
16 to get -- this one notebook that I was provided
17 with doesn't -- the tabs don't match up to the
18 index to it. So why don't we figure out what
19 documents we have here. What is this? U.S.
20 District Court in West Palm Beach tabs one through
21 25 plaintiff's/counterdefendant's motion for
22 partial summary judgment. Is that the motion for
23 partial summary judgment?

24 MR. CHASE: Correct, Your Honor. That was
25 the oldest motion that was filed on July 5th.

1 THE COURT: In federal court.

2 MR. CHASE: In federal court.

3 THE COURT: Okay. You have not converted
4 this and filed it in state court.

5 MS. DUFFIE: We filed it as an initial
6 filing.

7 MR. CHASE: We renewed it. Instead of
8 refiling it, they filed opposition in state court.
9 We filed a reply in state court.

10 THE COURT: Clear as mud. All right. So
11 that's your motion. You have four points to it.

12 MR. CHASE: Correct, Judge.

13 THE COURT: Florida law governs this
14 dispute. Why don't we take them one at a time. We
15 will go as far as we can today.

16 MR. CHASE: Would Your Honor like a summary
17 of the factual circumstances?

18 THE COURT: I will need some of it. I
19 mean, I did read enough that, I guess, I understand
20 defendant ultimately was working in California for
21 the plaintiff.

22 MR. CHASE: We don't see it that way.

23 THE COURT: Right. Why don't you give me a
24 summary.

25 MR. CHASE: So in 2011, there is a company

1 that existed since 1994, Apartment Rental
2 Associates. We will call them ARA.

3 THE COURT: Which is the plaintiff.

4 MR. CHASE: Which is the plaintiff. They
5 conduct business in a number of states, including a
6 substantial amount of business in Florida. In
7 2011, the defendant, Ms. Vysata, replied to an
8 advertisement for an unpaid internship.

9 Ms. Vysata started as an intern and then
10 she drafted in 2012 what was called a consulting
11 agreement. Ms. Vysata's background --

12 THE COURT: At this point in time, she was
13 living in California.

14 MR. CHASE: She was living in California at
15 the time. So she drafted a consulting agreement
16 and she is a real estate agent. She is not a real
17 estate broker. She was licensed as a real estate
18 sales person, real estate agent in California until
19 2015, and in Florida until 2007.

20 That document, which is Exhibit 1 to the
21 plaintiff's motion for partial summary judgment, is
22 a brokerage fee. It looks like a brokerage
23 agreement. It walks like a brokerage agreement.
24 It functions like a brokerage agreement. There is
25 no differentiation in it whatsoever and a brokerage

1 agreement except it is not called a brokerage
2 agreement.

3 The function of a brokerage agreement under
4 Chapter 475 of Florida law is an agreement that
5 calls for a commission payable to a broker for
6 brokerage activities that relate to real property.

7 THE COURT: And this assignment was
8 performed in California.

9 MR. CHASE: It was signed and executed in
10 California, but Ms. Vysata moved out of California
11 in 2015. Everything that is relevant in this case
12 happened after Ms. Vysata moved out of California.

13 She is a resident of Florida, undisputed.
14 She has bought two pieces of property.

15 THE COURT: She signed the agreement prior
16 to 2015.

17 MR. CHASE: She did, correct. There is
18 alleged performance from both sides after 2015. So
19 everything that happened before 2015, our position
20 is that it is completely irrelevant.

21 THE COURT: Okay. Go on.

22 MR. CHASE: Okay. The way Ms. Vysata was
23 paid on these transactions was literally the exact
24 manner in which an outside broker was paid, other
25 transactions representing the buyer. The outside

1 broker and Ms. Vysata in the same manner would
2 charge a percentage of the sales price, full
3 commission, so no salary, no underlying salary,
4 full commission.

5 What is a very key exhibit that we would
6 point out for the Court is the affidavit of Audrey
7 Yaboa who prepared Ms. Vysata's tax returns every
8 year since 2014. And Yaboa attests that never did
9 Ms. Vysata indicate that she was an employee of
10 Apartment Rental Associates.

11 In fact, Apartment Rental Associates never
12 indicated that Ms. Vysata was an employee.
13 Apartment Rental Associates never paid Ms. Vysata
14 any money. Mr. Manowitz never paid Ms. Vysata any
15 money. Every year since 2014 Ms. Vysata has
16 declared herself on her tax returns under oath,
17 Your Honor, as a self-employed person. And that is
18 because Ms. Vysata owns a number of different
19 businesses.

20 Ms. Vysata operates numerous different web
21 businesses, dating websites,
22 tinyhouseproperties.com, tinyhomeproperties.com, 15
23 domain names Ms. Vysata has. They are all on her
24 taxes. She had never received a W-2 or a 1099.

25 In contrast, Apartment Rental Associates

1 has employees and for the actual employees of
2 Apartment Rental Associates, those employees
3 receive W-2s. They receive 1099s. They are state
4 and federal and tax withhold, social security tax.
5 None of that happened with Ms. Vysata. Until all
6 times in (201) 420-1728 all of the years that were
7 relevant she was always 3,000 miles away whether
8 she was in Florida whether she was in Connecticut
9 whether she was in New York she had four different
10 residences. Nobody knows where she is. She has
11 four different cars. Nobody can keep track of her.

12 She has that right because she is a
13 self-employed person. Parties conduct business at
14 arm's length and Apartment Rental Associates is a
15 long-term client of Ms. Vysata. We agreed to that.

16 However, Ms. Vysata was never employed. In
17 the three years preceding 2018 so 2017. And 2014
18 Ms. Vysata and Mr. witnesses saw each other about
19 five or ten times total, total. That's not an
20 employer-employee relationship. Ms. Vysata would
21 take time off, substantial amounts of time, 40
22 hours of time to receive her commercial pilot's
23 license. She, Ms. Vysata, studied in Europe. She
24 has every right to do it because she is an
25 independent contractor. The parties got into a

1 dispute because in the latter part of 2015 and it
2 will show this very clearly the dispute centers
3 around Ms. Vysata not wanting to come to
4 California, frankly not wanting to come to
5 California. And the parties parted ways in
6 November of 2017.

7 The parties both agreed in its own right to
8 stop working with each other. At the end of the
9 relationship, there was some discussion about a
10 resolution as to the parties' competing claims.
11 The parties weren't able to resolve. The parties
12 went forward with litigation.

13 The lawsuit was filed here in this Court on
14 March 13, 28 by Apartment Rental Associates and
15 Mr. witnesses as plaintiffs. They filed the
16 complaint. On May 9, 54 days later, Ms. Vysata
17 removed to the U.S. District Court for the Southern
18 District of Florida; never filed a motion for
19 summary judgment, never filed a motion for summary
20 judgment for non conveniens, none of that.

21 Then on day 16, Ms. Vysata filed a seven-
22 count counterclaim with claims under Florida law,
23 claims under ethical law, and most importantly,
24 Your Honor, a breach of contract claim. That
25 contract, the same consulting agreement we contend

1 that is a brokerage agreement. She says there is a
2 breach of that agreement. That agreement was
3 brought by Ms. Vysata in this Court. This Court is
4 the court to decide that. There has been an
5 amended complaint.

6 THE COURT: This Court or the federal
7 court?

8 MR. CHASE: This Court. So the federal
9 court.

10 THE COURT: Remanded.

11 MR. CHASE: Remanded pursuant to our motion
12 for remand it was an untimely removal. There was
13 some games with service of process and Judge
14 Rosenberg determined that the initial service which
15 we effectuated was valid.

16 And so Judge Rosenberg remanded it because
17 the removal was untimely in no way can the under
18 typically necessary of a removal enure to Ms.
19 Vysata's benefit. In no way. It was remanded on
20 8-1. Then on 8-7, 144 days after service was
21 effectuated on March 16, that is when the motion
22 for forum non conveniens was filed under rule
23 1.0062 G. The case is crystal clear and says that
24 the case must be brought within 60 days. The
25 fourth district has been crystal clear.

1 THE COURT: What about the issues she
2 raises excusable neglect, but what about the cases
3 that show that you can consider excusable neglect?
4 It says shall.

5 MR. CHASE: I'm not aware of a case where
6 excusable neglect has been held to extend that
7 60-day --

8 THE COURT: That is not a kind of argument
9 for forum non conveniens.

10 MR. CHASE: That kind of dovetails into
11 that, but I could stick with the motion for partial
12 summary judgment.

13 THE COURT: It is forum non conveniens,
14 then should I rule on the motion for summary
15 judgment?

16 MR. CHASE: If the Court would grant the
17 motion for forum non conveniens, that could moot
18 the motion for partial summary judgment.

19 THE COURT: I am not inclined to do it one
20 way or the other. I don't want this to be seen as
21 a signal. It just seemed to meet threshold. You
22 are touching on both motions.

23 MR. CHASE: So the first point of the
24 motion for partial summary judgment, which is the
25 first motion that was filed in terms of the time

1 frame, is Florida law should govern. Why should
2 Florida law govern? Because Ms. Vysata is
3 undisputedly a resident of Florida. She declared
4 her Boca Raton home as her homestead for two years
5 in a row, 2017 and forward looking, 2018.

6 There is no dispute that there is personal
7 jurisdiction over Ms. Vysata in Florida. There is
8 no dispute that a Florida real estate transaction
9 in Gadsden County, Florida began in 2017 and
10 continued into 2018.

11 That's one of the two real estate
12 transactions that's disputed with respect to this
13 commission. Ms. Vysata filed in this case not in
14 any California case that there is a breach of
15 contract, this very contract. Subsequent to Ms.
16 Vysata's seven-count counterclaim, including the
17 seven-count counterclaim, including all manner of
18 claims in Florida.

19 On June 12, a month later, Ms. Vysata filed
20 without moving to amend her counterclaim in this
21 case, she filed a lawsuit against Apartment Rental
22 Associates and Mr. Manowitz in Los Angeles Superior
23 Court for sexual harassment and she made those
24 claims claiming that she was an employee some 3,000
25 miles away when the parties are subject to this

1 written brokerage agreement where we couldn't send
2 she is absolutely not an employee.

3 THE COURT: When was that filed?

4 MR. CHASE: That was filed on 6-12. So
5 that was filed a full month after the seven-count
6 counterclaim in this case. In fact, some of the
7 counts in the seven-count counterclaim are actually
8 from the same labor law subsection that the counts
9 were filed in the California action.

10 What we have responded with, with respect
11 to the California lawsuit is we have moved to
12 dismiss it based on claimants and that's a phrase
13 res adjudicata that we have cited the Supreme
14 Court, 9th Circuit, 11th Circuit across the board
15 courts substantially frown upon, I wouldn't say
16 substantially uniformly putting claims in different
17 baskets.

18 We have contended all along that all the
19 claims between these parties should be litigated in
20 the same court, in the same action.

21 THE COURT: So you agree on that.

22 MR. CHASE: We agree on that. So when
23 determining which court should hear the claims,
24 there is a rule called the first to file rule. And
25 the first to file rule says the plaintiff gets the

1 presumption. If there is proper jurisdiction in
2 that first court, the plaintiff gets the
3 presumption.

4 THE COURT: There is case law that has
5 weakened that significantly.

6 MR. CHASE: Sure, but in this case, Judge,
7 it is not just the plaintiff, it is the plaintiff,
8 the counterclaimant and then the plaintiff for the
9 amended claim. So it is not just the first to
10 file. The first to file was Apartment Rental
11 Associates, Mark Manowitz here.

12 The second to file was Ms. Vysata here. At
13 no point prior to 8-7, 144 days after she was
14 served, did Ms. Vysata move to transfer this case
15 to the California case. Never.

16 In this case, we have exchanged, the
17 parties, 14,344 documents in discovery. The
18 parties have responded to 11 different sets of
19 discovery responses. Two depositions have been
20 taken in this county. In California, no discovery
21 has been taken at all. There have been discovery
22 requests served by Ms. Vysata which are duplicative
23 of discovery requests in this case, in which we
24 have moved for a stay and moved for a protective
25 order.

1 It is our position that, number one,
2 related to the motions today, the dispositive
3 motions, we believe there is no merits to any of
4 the motions to dismiss, number one.

5 The motion to dismiss for forum non
6 conveniens is untimely as a matter of law, and even
7 if it wasn't untimely, it is not well taken. It
8 fails on all the different substantive grounds.

9 The motion to dismiss the first amended
10 complaint, we have responses to that, and I could
11 go through them if the Court would like. And we
12 believe that that would be denied. The first
13 amended complaint is extraordinarily comprehensive.

14 They show the claims' fundamental facts,
15 according to each claim and dismissal should not be
16 granted. So what we are left with here, Judge, are
17 proceedings that are happening in California and
18 proceedings that are happening here.

19 And I can inform the Court about the most
20 recent discussions that occurred in California less
21 than two weeks ago. The California court asked the
22 parties to report back after these motions were
23 litigated and resolved. So we would like to
24 litigate these motions.

25 We have north of 23 different subpoenas

1 that we have now narrowed the scope on almost all
2 of them and plan to file them in Florida.

3 To the extent that there is a discussion
4 about out-of-state evidence and out-of-state
5 witnesses, we have now made the defendants aware of
6 what the case law is.

7 The case law is that serving notice of
8 intent to serve a subpoena under Florida rule
9 1.351, and then if it is an out-of-state subpoena,
10 then you follow the domestication process pursuant
11 to the Uniform Discovery Act.

12 THE COURT: Yeah, I was going to ask,
13 because I didn't agree to compulsory service
14 because service of process is not available. That
15 was one of the arguments that was made. You were
16 saying that compulsory service of process is not
17 available to some party.

18 MS. DUFFIE: Not the motion to raise it res
19 adjudicata.

20 THE COURT: No, for forum non conveniens.
21 Yeah, one of the arguments was you couldn't get
22 other witnesses, but I think there is process that
23 you can, not that I think it matters.

24 MS. DUFFIE: You mean the subpoena power.

25 THE COURT: Yeah. What's going to be the

1 most -- what's weird to me about the size of this
2 case is the initial claims on the real estate
3 brokerage contract agreement are narrow.

4 There is not going to be that many
5 witnesses to it. It is a narrow universe. You
6 have a sexual harassment employment case in
7 California, that's going to be incredibly witness
8 intensive.

9 MR. CHASE: Judge, I can respond to that.

10 THE COURT: So bringing that from
11 California to here, and I used the employee term,
12 and I didn't really mean to be that specific and I
13 saw your sensitivity to that, but I wasn't making a
14 ruling on the clarification, but if that allegation
15 is there while she was an employee of the company
16 and what the company is, if it is a California
17 company, it seems to me that that case is much
18 stronger, much more policy reasons to have that go
19 forward in California, not here.

20 MR. CHASE: A few thoughts on that. One,
21 we have stated this and it is set forth in the
22 complaint that there are more witnesses in Florida
23 as to that than there are in California.

24 Everything that is alleged in that
25 complaint that happened to have been filed in

1 California because the attorneys frankly live on
2 the west coast, and three of the attorneys that are
3 on that case are on the west coast. That's the
4 inconvenience. Ms. Vysata lives here.

5 So the notion that if more evidence is
6 somewhere else, Mr. Manowitz and Apartment Rental
7 Associates have not only consented to the
8 jurisdiction of this Court, have selected the
9 jurisdiction of this Court because this is where
10 personal jurisdiction over Ms. Vysata is.

11 So evidence can be obtained, a subpoena for
12 documents as to ARA, the company, can be served on
13 counsel. This discussion about evidence being
14 somewhere else. It is not 1758.

15 There are uniform interstate discovery acts
16 that documents can be produced when there is --
17 across state lines. So this is not this federalism
18 issue with respect to subpoenas.

19 THE COURT: But you are going to argue now
20 that you can't go forward -- you are going to argue
21 now on the res adjudicata on the claims in
22 California, but what you are telling me now is your
23 client would be amenable to having those claims
24 brought within this lawsuit.

25 MR. CHASE: Absolutely, Judge.

1 THE COURT: What's the benefit to that?

2 MR. CHASE: The benefit is administrative
3 convenience for starters. Also the case law
4 requires it, because any time there is a common
5 nucleus of operative facts, and here, there cannot
6 be any credible assertion that there is not a
7 common nucleus of operative facts with the parties
8 communications over the years.

9 There is only an allegation against Mr.
10 Manowitz. The company stuff, that's really kind of
11 a misnomer because it is really kind of just one
12 person. So there have been --

13 THE COURT: Yeah, that's what I saw in some
14 of the documents. Who is the argument that this
15 consulting agreement was with? It is signed by him
16 and apparently individually.

17 MR. CHASE: And Apartment Rental Associates
18 as the company.

19 THE COURT: It says it's between agent of
20 Apartment Rental Associates. I am sure you all
21 dispute what that is. Is it a company contract or
22 is it an individual contract?

23 MR. CHASE: We say it is an individual
24 contract. Ms. Vysata drafted it. So the
25 performance of a contract in breach of a contract,

1 not the existence of the contract. Nobody disputes
2 the existence of the contract.

3 The performance and the breach of the
4 contract is always, under California law and
5 Florida law, governed by the state's law where
6 performance was rendered or breach occurred.

7 THE COURT: Well, here you have one --
8 where was the other property performed? You said
9 one property -- and this is just the sale of
10 property, right? One property was in Florida.

11 MR. CHASE: The other one was in Louisiana,
12 nothing in California.

13 MS. DUFFIE: Your Honor, to clarify, the
14 one property, Ms. Vysata hasn't been paid on.
15 That's the only property that is located in
16 Florida. The other properties are located outside
17 of Florida.

18 THE COURT: In Louisiana, the other one?

19 MS. DUFFIE: Yes.

20 MR. CHASE: A key part of this case, Judge,
21 with respect to these, quote unquote "wage claims,"
22 she never received any wages anyway. This
23 agreement on its face is actually enforceable
24 because it is an unlicensed brokerage agreement.

25 That's why chapter 145 in Florida law is so

1 important because there is no legal obligation,
2 there can't be a legal obligation. That agreement
3 is cut off. It is null and void. The parties did
4 perform under it in the past, but as to a future
5 obligation under that agreement legally, there
6 cannot be one, because it would be illegal.

7 And the Florida Department of Real Estate
8 agrees and there is an investigation as to Ms.
9 Vysata's unlicensed brokerage activities from the
10 State of Florida.

11 So that agreement can't be used in the
12 breach of contract claim to demand that anyone owes
13 Ms. Vysata any money as a matter of law because it
14 is void and unenforceable. So that is a point of
15 law --

16 THE COURT: Well, it wouldn't be void and
17 unenforceable for the Louisiana property.

18 MR. CHASE: Perhaps, and so this is
19 something that was thought of. The question is, if
20 a broker, unlicensed or licensed, is stationed in
21 Florida, there is no dispute that this is a Florida
22 broker charging money from Florida of third
23 parties, but when that property is located in
24 Florida, no question, 475 applies.

25 The question is if the property is located

1 in Louisiana, what state law applies to whether
2 that commission --

3 THE COURT: Louisiana, wouldn't it?

4 MR. CHASE: Maybe. Our position is that it
5 is still Florida law applies, because this is
6 Florida brokerage. Whether the real estate --

7 THE COURT: Yeah. Let me stop you with a
8 nod. But you have an agreement signed in
9 California. Just because of the fact that she
10 lives here doesn't mean she is conducting business
11 here.

12 MR. CHASE: But imagine, Your Honor, if she
13 was a licensed Florida broker. Her business was in
14 Florida. That would be jurisdiction in Florida
15 under the purview and ambit of 475.

16 THE COURT: If I have a Florida licensed
17 broker and I fly to Louisiana and I do a deal in
18 Louisiana, I'm not doing that as a Florida licensed
19 broker because I don't need my license for that
20 deal in Louisiana. So Louisiana law would apply to
21 it.

22 MR. CHASE: Well, 475 -- I'm not aware of a
23 case that has held and we have looked at the cases
24 that defendant has cited with the principle that,
25 quote, some other state's law should apply when the

1 broker is located in Florida.

2 No case law that I have seen, and if there
3 is other case law, I would happy to look at it, no
4 case has held that a Florida real estate broker
5 that attempts to charge fees for an out-of-state
6 transaction, let's assume it is in North Dakota, no
7 case has held that that broker is not regulated by
8 chapter 475, because all Florida brokers are
9 regulated by Florida statute section 475. That is
10 the governing statute.

11 THE COURT: But do you have a case that
12 says when the Florida broker is in Texas, that
13 their actions in Texas with Texas residents are
14 governed by the Florida statute?

15 MR. CHASE: I haven't seen it, but what we
16 have seen is that when that Florida broker is
17 unlicensed, they can collect commissions in no
18 states, certainly not in Florida. It would be
19 unlicensed activity.

20 Ms. Vysata after 2015 was licensed to be a
21 broker nowhere. Actually, Ms. Vysata has never
22 been licensed to be a broker. So she can't collect
23 a commission. So what is being asserted is this
24 retroactive assertion of, oh, I was an employee,
25 but I guess I must have misclassified myself.

1 So we have never had an objection, Your
2 Honor, to the sexual harassment claims being
3 brought in this Court. We have never had a
4 substantive objection. We never said you can't
5 bring it. We have conducted substantial discovery
6 in this Court. Let's keep it in this Court. We
7 want to litigate it all together.

8 So we have no objection to an amendment of
9 the counterclaim to allow those claims to be
10 brought.

11 THE COURT: We can't even touch the surface
12 of all of this is stuff. It's too many issues. I
13 am focusing now more on the law that applies in the
14 relationship -- I understand the relationship
15 between these two cases and these two parties.

16 Where do you stand on the forum non
17 conveniens? I think you did cite a case that says
18 justifiable excuse can be used to extend the
19 timing.

20 The threshold issue to me is the timing
21 because I think the statute does say shall do it
22 within 60 days. I didn't see an impediment to not
23 raising the issue even in federal court, if forum
24 non conveniens translates over both courts.

25 Instead of a counterclaim, that could have

1 been a defense raised in the federal court.

2 MS. DUFFIE: Well, Your Honor, it is
3 Florida statute 1.601(d), which requires 60-day
4 service. There is no equivalent statute in federal
5 court.

6 THE COURT: No, the timing.

7 MS. DUFFIE: Our position is that the case
8 was pending in Federal court for, I believe, it was
9 54 days. And then the motion to dismiss based on
10 forum non conveniens was filed on August 16.

11 THE COURT: Six days after it came back.

12 MS. DUFFIE: Right, six days after it came
13 back. So it would have been at the very least six
14 days after the federal court granted the motion to
15 remand, which is when state court motion was
16 actually filed. So our position is the time when
17 it was pending in federal court, the statute stayed
18 it.

19 THE COURT: The tolling stayed it.

20 MS. DUFFIE: Right, the statute 1.061 the
21 statute wasn't running. So our position is that it
22 was filed timely or in the alternative, if Your
23 Honor finds it wasn't filed timely, our position is
24 that it would be excusable neglect.

25 THE COURT: What were you doing in the

1 federal court? You removed it to federal court.

2 MS. DUFFIE: We had a hearing. I attended
3 the hearing with Mr. Chase where the Court took
4 testimony to determine whether or not there was
5 proper service made; whether Ms. Vysata was
6 properly served, because they actually effectuated
7 service through her mother.

8 THE COURT: Got you. Was it ever ruled
9 upon?

10 MS. DUFFIE: Yes. She felt it was proper
11 service and that's when the case was remanded back
12 to you with our motion to dismiss.

13 THE COURT: Was it served in Palm Beach
14 County under Florida law.

15 MS. DUFFIE: Right, in Boca Raton.

16 MR. CHASE: Your Honor, I have a couple of
17 cases. I have provided these to counsel. It is
18 Phillips versus American Optical Corporation in
19 Costa core Share and Cruises. May I approach?

20 THE COURT: Do they deal with remands?

21 MR. CHASE: They do. Not with remands.
22 With respect to the federal court proceedings that
23 would be governed by rule 12, and it was not even a
24 proper motion to dismiss under rule 12.

25 THE COURT: They are reflecting service.

1 Was a response filed to the complaint in federal
2 court, the counterclaims in federal court or filed
3 subsequently?

4 MR. CHASE: I don't know that a response
5 has been filed pursuant to the counterclaim to the
6 amended complaint. We filed an answer -- actually,
7 yes.

8 We filed an answer to the counterclaims in
9 federal court and the holding of the district court
10 was that service was proper the whole time and the
11 motion to quash was denied. So service was proper.

12 So it would be one thing if service was
13 improper and it was some defect in service. Here,
14 there is no exception for remand scenarios, and the
15 Fourth DCA has been crystal clear and uniform
16 across the board about the 60-day rule under rule
17 1.60 1(g).

18 MS. DUFFIE: We cited a case, S.U. Global
19 Inc. versus Tactical Support Services, there is a
20 Florida district court case, a DCA case that says
21 the plain meaning of the rule allows the trial
22 court to consider whether excusable neglect applies
23 to the forum non conveniens context.

24 THE COURT: That was the excusable neglect
25 case that I looked at. What's the excusable

1 neglect? You're saying that --

2 MS. DUFFIE: Our position was just that
3 while the case was pending, that jurisdiction lied
4 in the federal court.

5 THE COURT: There was no clock running
6 against you in state court.

7 MS. DUFFIE: Correct.

8 MR. CHASE: Even if that were true, Judge,
9 jurisdiction was in the federal court, they still
10 missed the rule 12 deadline.

11 THE COURT: I don't know if they did. Is
12 that a motion?

13 MR. CHASE: Right, Judge. We filed the
14 counterclaim. Our complaint they were served on
15 3-6-16 removed to federal court on 5-9 and a
16 counterclaim on 5-16. They should have filed a
17 motion to dismiss on rule 12 for forum non
18 conveniens.

19 If they were relying on federal court
20 analog, that was the time to do it. The rule 12
21 expired months ago.

22 THE COURT: I think what counsel said is
23 there is no deadline for filing forum non
24 conveniens in federal court. The rule 12 is not a
25 deadline for them.

1 MR. CHASE: My understanding is that there
2 is a rule 12 motion to dismiss for forum non
3 conveniens. If this is a motion to dismiss for
4 forum non conveniens not under rule 12, that would
5 be an interesting position for them to be relying
6 on.

7 None of the case law in the Fourth DCA or
8 anywhere in Florida has held that that is excusable
9 neglect.

10 THE COURT: All right.

11 MR. CHASE: And one more point on that,
12 Judge.

13 THE COURT: Yes.

14 MR. CHASE: The parties engaged in a
15 feverish amount of discovery in the federal court.
16 We were served with discovery requests, a motion to
17 compel, all this before a motion to dismiss for
18 forum non conveniens. Then it didn't become
19 inconvenient until a remand. It was convenient
20 before that in litigation and then it became
21 inconvenient.

22 THE COURT: That's what I'm trying to
23 gauge. So, yes, basically in the federal court
24 proceedings, you guys went forward, raised
25 affirmative defenses, sought affirmative relief.

1 MS. DUFFIE: Were didn't have to waive
2 them.

3 MR. CHASE: Also served discovery and a
4 motion to compel.

5 MS. DUFFIE: Your Honor, should we reset
6 the motions for when you have, when there is a lot
7 more, I don't know if you go on your docket trial
8 calendar for a non-evidentiary hearing, what makes
9 more sense to you.

10 THE COURT: What makes more sense is trying
11 to get this resolved now. I'm just not sure I have
12 enough information. I have too much information in
13 one sense that I have got these lined up. I'm not
14 sure, just going back to the Florida law that
15 governs this disputes, I'm not sure what law, just
16 because it becomes moot, I don't think it drags
17 everything with it.

18 I'm going to need to know more. I'm not
19 going to have five days to spend on this case on
20 these motions. We need to figure out a way to get
21 this more concisely packaged for me.

22 MR. CHASE: I have a suggestion for Your
23 Honor. Perhaps we could hold the motion for
24 partial summary judgment in abeyance and the court
25 could rule on the motions to dismiss. Maybe that

1 would move the case forward.

2 THE COURT: You have the independent
3 contractor versus the employee. I'm just looking
4 at your partial motion. So this is the federal
5 court one, right?

6 MR. CHASE: Right. What I'm saying is we
7 can withdraw that for the time being or hold it in
8 abeyance to make it more discreet.

9 THE COURT: The problem is they are all
10 interwoven. Which court, which law applies may
11 affect where this is best litigated. You know, one
12 if the California law is the law that applies
13 although I don't really see much argument for that.
14 What law is you are arguing applies?

15 MS. DUFFIE: Well, Your Honor, our position
16 is Florida law doesn't apply because the one sole
17 property at issue in Florida Ms. Vysata was never
18 paid on.

19 THE COURT: Yeah, but she is suing to be
20 paid, right?

21 MS. DUFFIE: Correct.

22 THE COURT: You are trying to enforce
23 payment so you can't say she hasn't been paid loses
24 the Florida interest. That squarely falls within
25 Florida law and all the defenses that they have

1 raised. She is trying to collect a commission on
2 the sale of Florida property while she was living
3 in Florida.

4 You know, I don't see a way around these
5 Florida brokerage requirements.

6 MS. DUFFIE: Right. For the one Florida
7 property, I can't argue with you.

8 THE COURT: Yeah. That almost warrants
9 dismissal of that claim right there.

10 MS. DUFFIE: Dismissal of which claim?

11 THE COURT: Her claim to recover those
12 commissions.

13 MS. DUFFIE: So you mean --

14 THE COURT: I don't know how the counts are
15 laid out. I haven't been dealing with this case
16 for a while. I don't have a half a day to
17 leisurely read through all of this. I try my best
18 to be overly prepared, but I don't see how, I mean,
19 you are conducting yourselves in Florida.

20 I think the laws that they have lied out
21 apply to participate in the brokerage business. Is
22 that why you are trying to characterize this as an
23 employee? She would still be subject to Florida
24 brokerage laws, wouldn't she?

25 MS. DUFFIE: Well, Your Honor, she only

1 moved to Florida in 2015.

2 THE COURT: That is what I have written.

3 MS. DUFFIE: Right. And she began
4 employment with the plaintiff much earlier.

5 THE COURT: Right. Before she got to
6 Florida, you know, in the beginning of 2012.
7 Actually, you said she started as an intern.

8 MS. DUFFIE: Right. She started working
9 from September of 2011 until February of 2018 and
10 then she became an analyst. And Your Honor, just
11 to briefly address opposing counsel's position
12 about her employment agreement. My firm often
13 files lawsuits based on classification.

14 More often than not, employees misclassify
15 themselves or just adhere to whatever
16 classification was provided to them by their
17 employer.

18 THE COURT: Right.

19 MS. DUFFIE: But that is not a --

20 THE COURT: Determinative.

21 MS. DUFFIE: It is not determinative.
22 That's correct. That's something we see often.

23 MR. CHASE: Judge, this was not a captive
24 individual. This was somebody way away.

25 THE COURT: I know, these are the factual

1 arguments, but I am sure there are counter
2 arguments about how she was controlled or what have
3 you. But, all right, how do we organize this so
4 that I can actually make some rulings?

5 MR. CHASE: Your Honor, here is what I
6 suggest. We step back, the plaintiffs step back
7 from the motions for partial summary judgment
8 because there is a lot of moving parts and I think
9 the more simple and discreet motion that the Court
10 can rule on, particularly the motion to dismiss for
11 forum non conveniens, that's a Fourth DCA case
12 directly on point. There are a whole line of cases
13 directly on point.

14 There has not been an adequate showing of
15 excusable neglect, nothing that has been shown at
16 all, and even if it was an attorney error, they
17 haven't even said it was an error.

18 It was a tactical decision to move forward
19 full steam in Florida until they decided they
20 didn't want to. So the rule is crystal clear and
21 it is a 60-day hard and fast rule. Use it or loose
22 it. No exception for remands.

23 MR. KALISH: And Your Honor, this is Dan
24 Kalish. Ms. Duffie is our local counsel. She
25 doesn't know quite know the tactical strategies, I

1 would default. The basic idea is that we were
2 waiting to see what court we were going to be in.

3 We did not know if we were going to be in
4 federal court or how had to be remanded to State
5 court and as a result, we wanted to wait for that
6 resolution before we started to file a lot of our
7 two substantive motions.

8 There were two substantive motions that we
9 wanted to present to the federal court in Florida
10 or the state court for Florida and those were
11 motion for to dismiss for failure to state a claim
12 and motion to dismiss for forum non conveniens.

13 Our strategy was to see what court was
14 appropriate and then decide. From our perspective,
15 we didn't know quite how to file a motion to
16 dismiss for forum non conveniens in the Florida
17 state court when there is no pending action in the
18 Florida state court, because it was in Federal
19 court.

20 And the way we reviewed the rule was that
21 if it is a Florida State court action, you have to
22 file it within 60 days. If it is a Florida federal
23 court action, you actually don't have to file it
24 within 60 days, and actually there is not a time
25 limit in Florida federal court. And it is not

1 appropriate for a rule 12 motion. You are not
2 supposed to bring it as a 12 B motion.

3 You are supposed to bring it another way.
4 That's why the way we viewed it was that we didn't
5 quite know what to do, but we thought the better
6 reading was that if we were in Florida court, the
7 Florida procedures apply, the procedure that you
8 have to file within 60 days, and that's why we
9 didn't do it in federal court. We intended to
10 once we got a ruling that we were going to be in
11 Federal court which we thought was more
12 appropriate.

13 Once the case was remanded, we recalculated
14 the 60-day calendar and we I ended up filing within
15 60 days that it was in Florida state court.

16 THE COURT: What was the date, it was 54
17 days before removal?

18 MS. DUFFIE: Yes, Your Honor.

19 THE COURT: And then six days after it was
20 remanded.

21 MS. DUFFIE: Correct.

22 THE COURT: So if you did consider the
23 federal court and tolling, it could have been on
24 time.

25 MS. DUFFIE: Yes, I believe it was a day

1 early.

2 MR. CHASE: I don't know if I agree with
3 that, Judge. Even if it was timely, and it was not
4 timely, as a matter of law, it shouldn't be granted
5 and we can argue the merits of that.

6 THE COURT: Forgive me, and I don't mean to
7 be so piecemeal over this, but I wanted to resolve
8 that timing issue, because it is not like they
9 could have filed a motion to protect the 60-day
10 limit while they were in federal court.

11 MR. CHASE: They could have dropped a
12 footnote. They could have said something. There
13 is no reason why they could have filed a rule
14 12(b)(3).

15 THE COURT: I think that's the wrong number
16 on non conveniens, but challenges to venue.

17 MR. CHASE: They didn't do it. They filed
18 a counterclaim and went forward full steam on
19 discovery.

20 THE COURT: That's the factor that to me
21 is not the 60-day time limit, but it is that
22 behavior of affirmatively litigating it here as
23 opposed to removing at your earliest convenience if
24 it is not convenient to try to take your stab at
25 something here.

1 That's why I was trying to get a handle on
2 exactly what motions you have filed in Florida.
3 You haven't filed answer to the motion to dismiss,
4 but you did file a counterclaim.

5 MR. CHASE: To the original complaint.
6 That was the time to file a motion to dismiss for
7 forum non conveniens.

8 THE COURT: I don't know if it is required,
9 but I think it just goes in the bundle of factors.
10 It is my understanding of the forum non conveniens
11 is that it's a balancing test. You know, all the
12 different reasons to proceed in one forum versus
13 the other, you pile them all up to see what
14 outweighs the other.

15 MR. KALISH: If I could add on that,
16 because I know a lot about the California
17 litigation. There is a pending sexual harassment
18 case in California. It is our view and Mr. Chase
19 and I myself disagree, but our opinion is that it
20 was not going to dismiss the California federal
21 court action and we are going to have a lawsuit and
22 the factual disputes are human and the witnesses
23 are human and when we talk about the witnesses in
24 each state in terms of in California, we have
25 Audrey Yaboa who is one of the people who provided

1 a declaration. She lives in California.

2 We have every single employee at the Los
3 Angeles office who he wants to basically depose who
4 we think are relevant to not only describe her
5 relationship between Manowitz and our client, but
6 also to describe exactly what Ms. Vysata did.

7 We also have another woman who has filed a
8 lawsuit against Manowitz and Apartment Rental
9 Associates in the California court and she was also
10 a victim of sexual harassment. And there is an
11 evidentiary rule that allows us to bring in similar
12 instances of sexual harassment in similar
13 situations we have had. So we have her testimony
14 as well, too.

15 And although we will be able to depose all
16 those people whether or not the case is in Florida.
17 We will not be able to bring those people to
18 testify in live court in Florida. So if we have a
19 jury trial in Florida on the sexual harassment
20 claims, we won't be able to, we cannot compel them
21 to get on a plane and fly to Florida.

22 As a result, we are not going to have, the
23 way we view it, about 80 percent of the witnesses
24 we need to actually testify in the sexual
25 harassment lawsuit if this case was in Florida.

1 That's why we think it is a lot more
2 appropriate in California. And one other thing
3 that Your Honor that hasn't been discussed.

4 Mr. Chase has brought up a lot about the
5 fact that they were the first to file in Florida
6 and there is a presumption. We don't believe that
7 presumption applies for a number of reasons, but
8 one of them is that they didn't have a legal right
9 to file their lawsuit in Florida state court.

10 You can only file a lawsuit in Florida
11 state court if you have registered to do business
12 in the State of Florida. They didn't do that.
13 They didn't actually do that until late September.

14 So when we think about sort of who filed
15 first, the way we think the Court should look at
16 this is who legally filed first. And it is our
17 view that basically they did not file their action
18 legally until late September at the earliest, and
19 it is also another reason why that should moot the
20 motion to dismiss.

21 THE COURT: You think that should moot it.
22 Does that defect in the foreclosure, if you don't
23 have possession the day you file you are out of
24 standing, but is that cured by filing.

25 MR. CHASE: Absolutely 100 percent, but it

1 doesn't apply to individual. It is cured right
2 away.

3 THE COURT: It is still unclear whether you
4 consider this an individual or a corporate
5 contract.

6 MR. KALISH: And Your Honor, I couldn't
7 find case law. The case law in other states almost
8 all states have a similar rule like that. Some
9 states I have found have that you could cure it.
10 Other states by, you know, just registering with
11 the states. Other states, they say you can't cure
12 it.

13 I looked at the Florida law and I wasn't
14 able to find Florida law. My view is it is a
15 position of first impression whether you could
16 actually cure it. We would argue that they can't.

17 But even if they could cure it, we would
18 argue that technically they shouldn't get the
19 advantage that they filed their lawsuit first when
20 they filed it properly and through all these
21 presumptions of fairness, et cetera should have
22 been considered legally filed in late September at
23 the earliest.

24 MR. CHASE: I have two responses in
25 response to that. Number one, that issue doesn't

1 apply to the individual at all. Mr. Manowitz is a
2 party and he was counterclaimed against as a party.

3 THE COURT: Really?

4 MR. CHASE: And it is absolutely cured once
5 that registration is done. It is done. With
6 respect to this notion that there are so many
7 people in California. Mr. Manowitz has submitted
8 to the jurisdiction in Florida. ARA and the three
9 people that are in the office, some of which don't
10 even know Ms. Vysata, didn't work with her, they
11 are newer people.

12 Ms. Vysata almost never was in the office.
13 So this knowledge of people in the office is a
14 fiction. There were 20 witnesses that we discussed
15 in our opposition that are in Florida, particularly
16 with respect to the sexual harassment claims. In
17 detail about this dinner as a restaurant in Miami
18 turns out it was at the Fountainbleu. That's
19 Florida. All the witnesses are in Florida. That's
20 all Florida.

21 There is discussions about flowers that
22 were sent to Ms. Vysata's home in Boca Raton. Her
23 mom saw. Her brother saw. Her neighbor saw. It
24 was a huge deal. There was a giant section of the
25 complaint devoted to that. The only witness in

1 California would be Mr. Manowitz.

2 Mr. Manowitz has substantial connections in
3 South Florida in Palm Beach County particularly.
4 There is an office of Apartment Rental Associates,
5 business that's connected in Florida.

6 So this California weight of gravity, if
7 you take the attorneys out of the equation and
8 imagine that Mr. Kalish, imagine that he is right
9 here, why are we talking about California at all.

10 The west coast attorneys, the three west
11 coast attorneys, it is more convenient for them,
12 but how could it be inconvenient for Ms. Vysata in
13 2018 with the Uniform Interstate Discovery Act.

14 This notion that Ms. Yaboa, who by the way
15 is a witness for the plaintiff in no shape that all
16 of a sudden Ms. Vysata so desperately wants Ms.
17 Yaboa to testify. We will be happy to bring Ms.
18 Yaboa.

19 She will testify that Ms. Vysata not only
20 declared herself a sophisticated person by the way,
21 not only declared herself to be a self-employed
22 person. It was affirmatively so. And she, in
23 fact, also and this is in Ms. Yaboa's affidavit,
24 told Ms. Vysata she is starting her other
25 businesses.

1 She is specifically self-employed. We will
2 see the tax returns at one point. We will see it.

3 MR. KALISH: Your Honor, if I could just
4 add. I think Mr. Chase is getting in the merits a
5 little bit, and maybe we should focus on what is
6 maybe a more convenient forum.

7 We disagree on a number of witnesses. It
8 is true. He said there is going to be a lot more
9 witnesses out of Florida. We believe there is
10 going to be a lot more witnesses out of California.
11 But one of the more important things I think that I
12 want this Court to focus on is Mr. Chase went to
13 the California court and made almost all of these
14 identical arguments. And the California federal
15 court dismissed this case, Your Honor, and we can
16 do all of this in Florida.

17 And the California federal court gave a
18 tentative ruling and I have attached that as one of
19 my exhibits. It lists the tentative ruling. The
20 tentative ruling is that California is going to
21 deny ARA's and Manowitz's motion to dismiss.

22 And that essentially means there will
23 almost surely be a federal court lawsuit in
24 California with the same parties and overlapping
25 issues. And we're going to have a situation that

1 we have now. We're going to have different rulings
2 from different courts. We're going to have
3 different, sort of different discovery rulings,
4 different rulings on res adjudicata and different
5 rulings on the same situations.

6 And what Mr. Chase emphasized in the
7 California courts is you shouldn't have two trials.
8 You should choose one and the California court says
9 that may all be good and dandy but my inclination
10 is I'm not dismissing the California federal court
11 action.

12 When you talk about forum non conveniens,
13 they do say, I don't know why it is not
14 inconvenient for Ms. Vysata to have the case in
15 Florida. And that's probably right in the sense
16 that, you know, it is not convenient for Ms. Vysata
17 in the sense of traveling, but it is also not
18 convenient for ARA and Manowitz to have the case in
19 California.

20 And because almost surely the case in
21 California will exist whatever this Court decides,
22 it's just I'm not sure based on plaintiff's own
23 argument doesn't make sense to have two trials in
24 two different courts in two different parts of the
25 country.

1 MR. CHASE: May I respond?

2 THE COURT: We'll get there. I guess it
3 depends on how sliced up the issues can be. We
4 will get there. We have a little bit of time. Is
5 the claims that are brought here, the contractual
6 claims that are brought here, are they also
7 cross-claimed or counterclaimed in California?

8 My bottom line is what's the overlap of the
9 same two lawsuits?

10 MR. CHASE: I can address that. The
11 overlap is that there was not a contract claim
12 brought in California.

13 THE COURT: It was an employment claim.

14 MR. CHASE: Yes, but under the same
15 California labor law statute, it is the
16 counterclaim in this case. There is no rhyme or
17 reason why two counts under the same California
18 labor law statute were brought and the counterclaim
19 brought in this case in 2016 and a month later
20 other California labor law counts were brought.

21 So a couple clarifications with regard to
22 the hearing. Mr. Kalish wasn't in the courtroom.
23 He didn't appear telephonically in the courtroom he
24 wasn't there. The tentative ruling was issued
25 before the hearing.

1 So what the court specifically held was I
2 want to wait and ask the parties to submit a joint
3 report on 11-28, on or before 11-28 after what Your
4 Honor rules upon with respect to the motions that
5 were referenced in that court. That's what the
6 holding was of the court. There hasn't been a
7 ruling by that court.

8 And I will say, because this transcript may
9 be put to that court.

10 THE COURT: I hate to return the favor.

11 MR. CHASE: Judge, the California court
12 stated that there was a belief that there cannot be
13 a transfer of a federal court case to a state court
14 case, which is correct, okay, because when we first
15 moved to dismiss or in the alternative to transfer,
16 it was in federal court, but the California court
17 also, there was some discussion that there was not
18 a belief that a federal court case and a state
19 court case, that the claims really applied when
20 there was two cases that were in different court
21 systems.

22 We have found case law in the intended
23 briefing, and that case law states that it doesn't
24 matter if it is a state law case and a federal
25 court case, the claim splitting doctrine applies

1 across the board.

2 THE COURT: I think you will find this
3 decision by Farmer drafted in the Fourth DCA that
4 basically says that a federal EEOC Title Seven
5 determination, is not res adjudicata and it is not
6 claim splitting to then bring a Chapter 760
7 specific resource commission in federal court after
8 the federal court, but we have not briefed on that
9 that day.

10 We are playing chicken because the federal
11 court wants to hear what I am going to do and I
12 want to hear what they are going to do.

13 MR. KALISH: If you want, and this might be
14 the best scenario so in my report saying this Court
15 hasn't ruled or the Florida court hasn't ruled and
16 wait until the California court rules, and that
17 might advise this is Court how to do things.

18 You know, I am primarily stating my
19 understanding of the Florida --

20 THE COURT: How tentative it was. It is
21 not an order so it is not an order, but what I'm
22 trying to figure out a way to go forward and how
23 the California court and myself will communicate
24 will be through your reports or maybe an order if I
25 issue it.

1 It seems to me that it hasn't gelled yet,
2 but the determination of whether she was an
3 employee of whether she was an independent
4 contractor is going to be threshold to that
5 California case.

6 If that's determined in the company's
7 favor, then, that's just going to evaporate that
8 case and then we all can be here.

9 MR. KALISH: No, can I add on that?

10 THE COURT: Please.

11 MR. KALISH: There is not a statute to
12 prevent sexual harassment against employees in
13 California. There is also a statute in California
14 that prevents sexual harassment against independent
15 contractors. So either Ms. Vysata is an
16 independent contractor or an employee. We have
17 filed lawsuits on both those California statutes.

18 So it does add certain damages possibly
19 that are different, but even if --

20 THE COURT: I hear you. I know where you
21 are going. I know there is a fight over California
22 for more reasons than just convenience. The laws
23 are different. That's the key issue, too, because
24 I don't know the extent of her harassment when she
25 was here or there, but if she has got this

1 relationship with a California-based company, she
2 has a right to sue them there.

3 And one of the California court's
4 consideration is going to be protecting their own
5 policies and their own rights. You can't raise
6 similar statutory protections that court is going
7 to keep it in California.

8 MR. CHASE: And Judge, there is no public
9 policy in California to extend California law to
10 non-citizens of California that holds the public
11 policy that does not extend it beyond California.

12 If Ms. Vysata wanted protection of
13 California laws, she could have stayed in
14 California but she didn't. She is not an
15 independent contractor or an employee. She is
16 self-employed.

17 THE COURT: I think you got a difference of
18 --

19 MS. DUFFIE: She also works for a
20 California employer.

21 THE COURT: Or a California contractor.

22 MR. CHASE: Or a client in California.

23 THE COURT: All right.

24 MR. KALISH: You can provide law that shows
25 that California law would apply if the conduct

1 which is if Manowitz and ARA is based in
2 California, then absolutely California law applies.

3 THE COURT: What I want to do, we're going
4 to need a lot more time, unfortunately. I really
5 wish I could have gotten more of my arms around
6 this, the motion to dismiss and everything, maybe a
7 couple of those particular issues.

8 I do think it is well taken that a
9 transaction in Florida taken while she was in
10 Florida was not consistent with those laws. I'm
11 not making a ruling on that, but there might be a
12 few of those that I can resolve first, but to me,
13 this forum non conveniens, I don't find it untimely
14 I don't know if I would call it excusable neglect,
15 but I think that interruption of how the case was
16 pending in Florida kind of, I don't even want to
17 call it tolling, but maybe if we considered it
18 tolling.

19 I think the timeliness issue, I may get
20 over, but what's smarter to do in the combination
21 of courts. If the federal court is going to
22 proceed and keep the particular claims it has,
23 maybe some of the claims I have are more
24 appropriately transferred there.

25 Maybe if those these are both going to

1 proceed simultaneously because of some Florida
2 interest, I find I don't know where I'm going. But
3 if I find it is not appropriate to transfer the
4 entire case of California, maybe pieces of it so we
5 are not duplicating or splitting causes of action.

6 MR. CHASE: I note that it is interesting
7 that the defendant is now adopting our argument
8 because what we have said is inconsistent and each
9 time we file a motion, they file one later.

10 Here has been the time line. Florida,
11 Florida. Then they file California. We move to
12 dismiss California. Another Florida. Then the
13 discovery in Florida, discovery in Florida,
14 discovery in Florida. Motion to compel evidence in
15 Florida. Then remand. And then only then is a
16 motion to dismiss in Florida.

17 So we have been consistent that it all
18 should be here. They have been all over the map
19 and they would not even necessarily have personal
20 jurisdiction over Ms. Vysata in California.

21 We could not have filed the lawsuit there
22 initially because she is not a resident there and
23 she is a self-employed person.

24 MS. DUFFIE: We agreed to submit to
25 jurisdiction, Your Honor.

1 MR. CHASE: And so is Mr. Manowitz.

2 THE COURT: If she is making all these
3 arguments and now told me she isn't, I have
4 something serious to say.

5 MR. CHASE: What they intended to file in
6 California, what they should have done is file a
7 motion to dismiss on forum non conveniens on 560
8 instead of filing a counterclaim here.

9 THE COURT: The one ruling I'm going to
10 make today is I don't think the 60-day rule is a
11 bar. That does not mean that how far and how
12 affirmatively she went forward in this state court
13 is not going to weigh against transferring the
14 case. I am hearing you.

15 She took very affirmative steps to litigate
16 here in the State of Florida. The farther along
17 she let discovery go before filing and the more
18 machinations and use Florida laws would bode
19 against the transfer.

20 MR. CHASE: And Judge, I can attach --

21 THE COURT: I don't mean to use all of
22 those terms -- we're talking over him.

23 MR. KALISH: And your Honor, that's fine
24 and I would like an opportunity to explain exactly
25 what happened. That hasn't really been a focus of

1 the briefing, but I would like to provide briefing
2 of exactly what happened in the Florida courts.

3 THE COURT: What I think I need to do. I
4 have a ream of paper in front of me. Let's do
5 this. Let's get to this issue. If I could you
6 take these and repackage them. I'm not trying to
7 make extra work.

8 Let's get additional briefs on the forum
9 non conveniens, because I would like to and how it
10 relates to the federal court. How the federal
11 court is proceeding. What this issue is, what
12 decisions that judge makes is going to make a
13 difference.

14 MR. KALISH: Yes, sir.

15 MR. CHASE: Judge, could we move to the
16 motion to dismiss the complaint.

17 THE COURT: I'm going to hold off on that.
18 Sorry. Yeah, I have got three people waiting on
19 hearings.

20 MR. CHASE: I just don't want the time here
21 being used against the plaintiffs in California of,
22 judge the judge doesn't deny the motions to dismiss
23 and that being used as a sword in California.

24 THE COURT: No, I have to take the
25 transcript. I merely didn't reach them strictly as

1 a result of time and resources. It is no
2 commentary on the merit or whether I think they
3 should be resolved here.

4 I think I have to have a better conceptual
5 understanding of the relationship between the two
6 cases what will happen if they proceed forward
7 separately.

8 MR. CHASE: Would it be more helpful for
9 the Court for us to do a two or three-page memo or
10 a longer one with all the attachments --

11 THE COURT: The shorter the better. Give
12 me two memos and if you think that something is
13 misstated in those memos, do a response to each
14 others memos.

15 MR. KALISH: Okay. We can do that and I
16 can work with opposing counsel and we can maybe
17 special set this for another date.

18 THE COURT: I will time it as best as I
19 can.

20 MR. KALISH: I understand.

21 THE COURT: What I will end up doing is get
22 you all fit in. But probably have to be on call
23 for a hearing and I don't mind the telephonic
24 appearances. I have two or three trial weeks in
25 December but I get 24, 48 hours notice. I can

1 leave, obviously if you guys are busy, I'm not
2 going to hold it against you if you couldn't make
3 it, but I'm trying to foreshadow and get your
4 papers to me and then within, by the end of the
5 month, I know with the holiday and everything and
6 what we will do is revisit.

7 Why don't we have a conference call just
8 for scheduling purposes. I do those from chambers.
9 I have all counsel get together and send me a call
10 in number and we won't talk about merits, just
11 coordination and you guys can inform me about
12 things, the scheduling of the California court.

13 MS. DUFFIE: We could call your assistant
14 to set that up.

15 THE COURT: Yeah.

16 MR. CHASE: Okay.

17 THE COURT: When you guys are ready.

18 MR. KALISH: Thank you very kindly.

19 THE COURT: When you have done your briefs
20 in this, summary memos, bullet points are great
21 with me. If they are not disputed points, if you
22 guys are agreement on points --

23 MR. CHASE: With a time frame.

24 THE COURT: Yeah, I know. And if
25 California is going to go forward with the case,

1 regardless of what I do, I need to know the scope
2 of it. That may help me define the scope of the
3 case here.

4 Excuse me that I'm not more knowledgable to
5 give you an example, but there may be part of this
6 case that would be better in California matched up
7 to whatever part of the case is there. To me, a
8 brokerage sale is on a Florida sale of property, I
9 have a stronger interest from the policy side of
10 enforcing law on the Florida residency contractor.

11 It may even be, I don't want to be accused
12 of splitting causes of action, but maybe not all of
13 this is proper in California, either. Sorry I
14 couldn't do more for you guys today.

15 MR. KALISH: Thank you for your time.

16 MR. CHASE: Thank you for your time.

17 THE COURT: Happy Thanksgiving everyone.

18 - - -

19 (Whereupon the proceedings were concluded
20 at 2:50 p.m.)

1 STATE OF FLORIDA)

2
3 COUNTY OF PALM BEACH)

4
5
6 I, Rick White, C.S.R., and R.P.R., hereby
7 certify that I was authorized and did
8 stenographically report the foregoing proceedings
9 and that this transcript is a true record of the
10 proceedings before the Court.

11
12 I further certify that I am not a
13 relative, employee, attorney, or counsel for any of
14 the parties nor am I a relative or employee of any
15 of the parties; attorney of counsel connected with
16 the action, nor am I financially interested in the
17 action.

18
19 DATED this 29th day of November, 2018.

My Commission #FF89792

20 Expires July 12, 2019

21 A handwritten signature in blue ink, appearing to read 'Rick White', is written over a faint, circular official stamp.

22 Rick White, R.P.R., C.S.R.
23
24
25

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